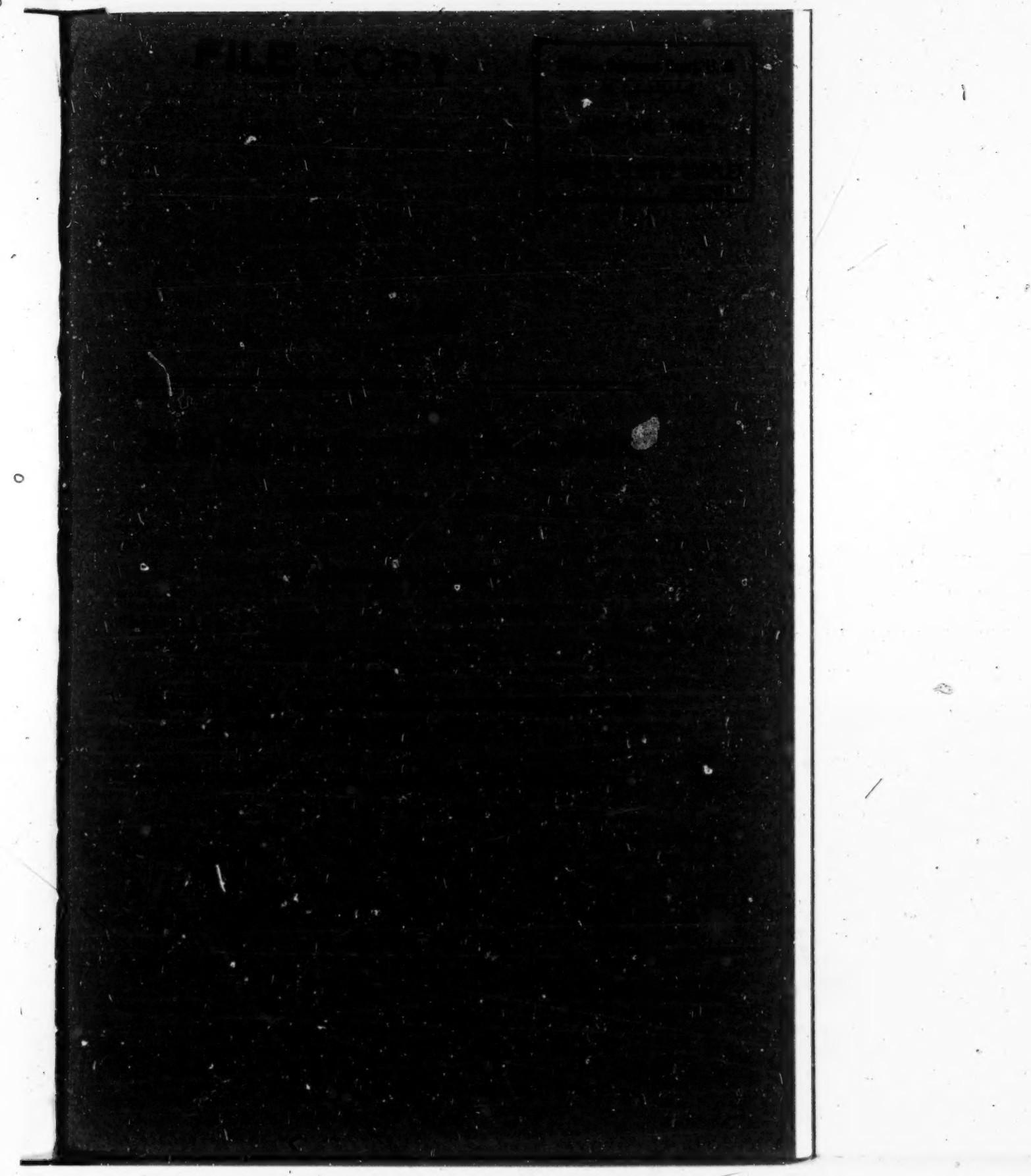


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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

L. R. BROOKS, PETITIONER

v.

ARCHIE J. DEWAR ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF NEVADA**

The Solicitor General, on behalf of L. R. Brooks, the Regional Grazier of the United States for Region Three, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada entered in the above case on October 24, 1940, affirming the judgment of the District Court of the Second Judicial District of Nevada in and for the County of Washoe.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42-57) is reported in 106 P. 2d 755. The District Court did not write an opinion.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Nevada sought to be reviewed was entered on October 24, 1940 (R. 57). The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied rights, titles, and immunities claimed by the petitioner under the Constitution, statutes, and authority of the United States.

The court below, on the theory that the Secretary of the Interior lacked authority under the Taylor Grazing Act to charge a low uniform fee for temporary grazing licenses, ordered the Regional Grazier to permit certain stockmen in Nevada to graze their livestock on the public domain "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the Secretary's rules and regulations (R. 32-35, 57-58). This decision vitally affects the orderly administration of the Taylor Grazing Act; it confers on Nevada stockmen a right to use the public lands of the United States without the Government's consent; and it invalidates rules and regulations of the Secretary of the Interior in a proceeding to which he was not a party. Hence, the decision below involves federal questions. These questions were raised by petitioner in the District Court (R. 31) and were argued by him in the Supreme Court of Nevada (R.

50). The grounds upon which it is contended that the questions involved are substantial are set forth under the Reasons for Granting the Writ, *infra*, pp. 7-17.

QUESTIONS PRESENTED

1. Whether under the Taylor Grazing Act the Secretary of the Interior has authority, pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.
2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.
3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 (R. 15-23), as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976, and of the regulations of the Secretary of the Interior issued thereunder (R. 23-27), are printed as an appendix, *infra*, pp. 18-28.

STATEMENT

Prior to 1934 settlers in the West enjoyed an implied and unrestricted license to graze livestock on the public domain free of charge. This unregulated use of the public lands of the United States resulted in numerous abuses which led to the adoption of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C., secs. 315 *et seq.*, an Act designed, as its title indicates, "To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range".

This Act is a comprehensive statute, requiring the Secretary of the Interior to ascertain which public lands (out of a total of 173,000,000 acres in the western states)¹ are "chiefly valuable for grazing and raising forage crops", and from such lands to designate grazing districts embracing not to exceed 142,000,000 acres.² Once these districts are established, the Secretary is directed (section 2) to "make provision for the protection, administration, regulation, and improvement of such grazing districts", to "make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary

¹ Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st sess., and H. R. 6462, 73d Cong., 2d sess. (1934), pp. 6, 7, 18.

² Amendatory Act of June 26, 1936, c. 842, 49 Stat. 1976.

to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range".

In carrying out the Act the Secretary is *authorized* (section 3) to issue term permits "to such bona fide settlers, residents, and other stock owners as *under his rules and regulations* are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time". In issuing these permits preference is to be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them". All permits are to be renewed if their denial will "impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."

After establishing the grazing districts contemplated by the Act, and pending the collection of information prerequisite to the issuance of the term permits authorized by section 3, the Secretary of the Interior, acting under section 2, promulgated regulations setting up a system of tem-

* Italics are ours throughout this petition.

porary licenses and uniform fees. That this system was not to be permanent was apparent from the regulations themselves (R. 23):

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle the owners, occupants or lessees to a preferential grazing privilege.*

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Thereafter, some forty persons who are engaged in the business of grazing livestock in Nevada, instituted the present suit in the state court against L. R. Brooks, the Regional Grazier of the United States for Region Three, to enjoin him from enforcing the licensing and fee provisions prescribed by the Secretary's regulations. The complaint alleges that the Act gives the Secretary no authority to require temporary, revocable licenses, as distinguished from term permits, that the Secretary has no authority to charge fees for such licenses, and that the grazing fees required by the regulations were fixed without any attempt to determine what would be a reasonable fee in

* Cf. 43 Code of Federal Regulations, sec. 501.1 (c).

each case (R. 8-9). Brooks demurred on the grounds (1) that the complaint does not state a cause of action; (2) that the Secretary of the Interior is an indispensable party and has not been joined; (3) that the suit is one against the United States to which it has not consented (R. 31). The demurrer was overruled and, upon Brooks' failure to answer further, judgment was entered enjoining him "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" in Nevada "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the departmental rules and regulations (R. 35).

The Supreme Court of Nevada affirmed (R. 57). It held that the suit was not one against the United States, and that the Secretary was not an indispensable party (R. 50). After expressly refusing to decide whether section 2 of the Taylor Grazing Act authorizes the issuance of temporary licenses or the charging of grazing fees (R. 56), the court held that in any event fees could not "legally be based upon the uniform rate prescribed by the Rules" (R. 57).

REASONS FOR GRANTING THE WRIT

1. *The decision below affects the orderly administration of an important federal statute, and is probably incorrect.*—Prior to 1934 more than

15,000 persons had been using the public range under an implied license, grazing thereon more than 8,000,000 head of livestock annually.¹ Although the Taylor Grazing Act terminated this implied license,² it nevertheless recognized that previous users should be accorded certain priority rights, to be based upon citizenship, residence in or near a grazing district, the ownership of other grazing facilities, water rights, etc.

The determination and allocation of grazing privileges among prior users in accordance with these provisions was not a simple administrative undertaking which could be accomplished speedily. A hasty and improper issuance of term permits could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction, would be continued and even aggravated, and the mortgage provision of section 3 frequently would prevent the subsequent cancellation of permits. On the other hand, if too few were issued, the livestock industry would be completely disrupted during the transition period. It is therefore obvious that some temporary *modus operandi* had to be devised

¹Cf. Annual Report, Sec'y Int., 1937, pp. 105-106.

²See *Buford v. Houts*, 133 U. S. 320; *United States v. Grimaud*, 220 U. S. 506, 521; *Light v. United States*, 220 U. S. 523, 535; *Itoxina v. Marble*, 56 Nev. 420, 432-433, 55 P. 2d 625 (1936).

pending the collection of the necessary data for the issuance of term permits.¹

A system of temporary licenses, for which a uniform fee was to be charged, was accordingly set up. There can be no doubt that section 2 of the Act, if it stood alone, would be ample authority for the licenses in question, because a comparable licensing system based on similar language in the Forest Reserve Act was upheld by this Court in *United States v. Grimaud*, 220 U. S. 506, and *Light v. United States*, 220 U. S. 523. But respondents in their briefs below contended, and the Nevada courts seem to have agreed, that the general grant of authority contained in section 2 of the Taylor Grazing Act is limited by the provisions of section 3 which deal with the issuance of term permits.

It is submitted, however, that the provision in section 3 that permits are to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time", does not preclude the issuance of temporary licenses, or even permits, at a low uniform fee. The present

¹ In fact, after six years, the task is only now nearing completion. Term permits have been issued in one district and authorized in another. During the next few months, permits are to be issued to approximately 50% of the present holders of temporary licenses, with additional permits in succeeding years as the necessary data is finally correlated. The Department of the Interior states that Nevada Grazing District No. 1, where this suit arises, cannot be placed on a permit basis for at least another year.

rates (5¢ a month for each head of cattle and 1¢ for sheep) are regarded by the Department as far below the actual value of the public range, and hence not unreasonable in any particular case.⁸ The "reasonable fee" provision of section 3 was inserted for the benefit of the stockmen—to prevent *excessive* exactions. If the Government elects to charge a lower fee, the stockmen cannot complain.

That a system of term permits could not be immediately instituted in all grazing districts throughout the West was known to Congress when it passed the Act. For example, Associate Forester Sherman had told the Public Lands Committee in 1933 that "There is not in the country an organization that would be prepared or equipped to put all of these [public] lands under administration tomorrow. It will have to be done gradually."⁹ Mr. Taylor, the sponsor of the Act, was of a similar opinion: "Of course, it will take some time to readjust the grazing rights [under the new Act]."¹⁰

Furthermore, the contemporaneous and considered interpretation of an act by the administrative agency charged with its enforcement is not lightly

⁸ The greater part of these fees are expended for rehabilitation purposes, range improvements, etc., as provided for by section 10 of the Act.

⁹ Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st sess., and H. R. 6462, 73d Cong., 2d sess. (1934), p. 51.

¹⁰ *Ibid.*, p. 77. Cf. similar observations made to the committee by Secretary Ickes, *ibid.*, p. 136.

to be disturbed by the courts. *Brewster v. Gage*, 280 U. S. 327, 336; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; *Fawcett Machine Co. v. United States*, 282 U. S. 375, 378.

Finally, even if there were some doubt whether the Act as originally drafted authorized the regulations complained of, it is submitted that Congress has by subsequent legislation ratified the system of temporary licenses of which respondents complain:

In the first place, Congress, knowing that *permits* were not being issued and that fees were being charged for *temporary licenses*,¹¹ has made annual appropriations for range improvements on the basis of such collections,¹² and has thus impliedly ratified the administrative practice of issuing temporary licenses on a fee basis.

In the second place, Congress in 1936 virtually reenacted the Taylor Grazing Act by extending its

¹¹ Annual Report, Sec'y Int., 1936, pp. 14-17; *ibid.*, 1937, pp. xii, 102, 105-108; *ibid.*, 1938, pp. xv, 107, 109, 113; 81 Cong. Rec., pt. 3, pp. 2738-2739 (1937); 83 Cong. Rec., pt. 9, p. 2376 (1938); 84 Cong. Rec., pt. 3, pp. 2734-2736 (1939); Hearings, Subcommittee of H. Committee on Appropriations, H. R. 10630, 74th Cong., 2d sess. (1936), pp. 13-15; *ibid.*, H. R. 6958, 75th Cong., 1st sess. (1937), pp. 83, 89; *ibid.*, H. R. 9621, 75th Cong., 3d sess. (1938), pp. 65, 70, 71; H. Rept. No. 1927, 74th Cong., 2d sess. (1936), p. 3.

¹² Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758; Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub., No. 640, 76th Cong., 3d sess.

provisions to another 62,000,000 acres of the public domain. Act of June 26, 1936, c. 842, 49 Stat. 1976. See *National Lead Co. v. United States*, 252 U. S. 140, 146; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493.

And lastly, in the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, c. 888, Public, No. 861, 76th Cong., 3d sess., Congress provided for the temporary suspension of "permits and licenses" under the Taylor Grazing Act, and for the "remission, reduction, or refund of grazing fees during such suspension." See also Act of July 14, 1939, c. 270, 53 Stat. 1002.

It therefore follows that the regulations complained of are valid, and that the complaint failed to state a cause of action. In a similar suit by stockmen in the Federal District Court for Oregon, seeking to enjoin enforcement of these same regulations, the District Court upheld their validity and the Circuit Court of Appeals for the Ninth Circuit said that it "would be disposed to sustain the court's ruling on that question if it were properly before us", although it went on to hold that the District Court was without jurisdiction because the amount in controversy did not exceed \$3,000. *Gavica v. Donaugh*, 93 F. 2d 173, 174 (C. C. A. 9).

2. *In holding that the United States is not an indispensable party the decision below is in probable conflict with decisions of this Court.*—It is a general rule that the United States is an indis-

pensable party to any suit brought to acquire an interest in, or the right to use, its public lands. *United States v. Minnesota*, 305 U. S. 382, 386; *New Mexico v. Lane*, 243 U. S. 52, 58; *Louisiana v. Garfield*, 211 U. S. 70. There are but two exceptions: first, those situations where the plaintiff already has some interest in the lands in question, an interest which is being unlawfully interfered with by an officer of the United States; and, secondly, those situations where Congress has granted an interest in lands in such explicit terms that its ascertainment is merely a ministerial function enforceable by mandamus.

This case does not come within the first exception. Respondents have no property rights in the public grazing lands in Nevada. Their implied license to graze livestock on such lands was terminated by the Taylor Grazing Act. Cf. *Light v. United States*, 220 U. S. 523, 535. Their suit is not one to enjoin an officer of the United States from interfering with their rights in the public range, but rather a suit to compel an officer to permit them to use the public range in conjunction with their private grazing facilities, on the plea that the latter cannot be profitably operated unless respondents are also allowed to make use of the public domain (R. 3-5). Such averments do not bring respondents within the rule enunciated in cases like *Philadelphia Co. v. Stimson*, 223 U. S. 605, and *United States v. Lee*, 106 U. S. 196.

Nor is this case within the second exception. The preferential status accorded to previous users by the Taylor Grazing Act is not a property right in any particular lands. And although it may ultimately serve as a basis for obtaining a term permit, the Act makes the allocation and determination of grazing privileges among eligible stockmen dependent on so many complex factors that mandamus obviously would not lie to compel the Secretary to allow respondents to graze a specified number of livestock on any particular sections of the public range. Cf. *New Mexico v. Lane*, 243 U. S. 52, 58.

If the United States would be an indispensable party to a mandamus action to acquire such a right, it is submitted that a forbidden result can not be indirectly accomplished by a so-called negative injunction. Whether the United States is an indispensable party is to be determined not by the form of the action but rather by the practical effect of the relief sought. *Louisiana v. McAdoo*, 234 U. S. 627, 629. Applying that test to this case, it will be noted that respondents requested (R. 14) and obtained (R. 35) a decree enjoining the Regional Grazier "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range * * * in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license". This injunction obviously affects

the property of the United States. It enables stockmen in Nevada to continue their use of the public range until the Department of the Interior is in a position to issue term permits. This right to use the public lands of the United States is a valuable property right.

Since Nevada stockmen have no rights at present in the lands in question, and since their preferential status does not entitle them to any rights enforceable by mandamus, it is submitted that the United States is an indispensable party to this suit, which is in reality designed to perpetuate a privilege which was revoked by Congress in 1934.

3. Whether a subordinate official may be restrained from enforcing regulations promulgated by his superior without the joinder of the latter is a question of importance which should be clarified by this Court.—Judge Learned Hand, in *National Conference on Legalizing Lotteries v. Goldman*, 85 F. 2d 66 (C. C. A. 2), has rightly observed that the rationale of the cases on this question is “not yet clear”. *Webster v. Fall*, 266 U. S. 507, *Gnerich v. Rutter*, 265 U. S. 388, and *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, hold that the superior officer must be joined.¹² *Colorado v.*

¹² *Gnerich v. Rutter* would appear to be clearly in point. That was a suit by a San Francisco pharmacist to enjoin the local prohibition commissioner from enforcing quantity restrictions placed in a permit issued pursuant to regulations promulgated under the National Prohibition Act by the Commissioner of Internal Revenue. In holding that the

Toll, 268 U. S. 228, though perhaps distinguishable, points the other way. The lower court decisions are in hopeless confusion.¹⁴ This conflict should be resolved.¹⁵ The question constantly recurs and is important to the Government and to private litigants alike.

The court below relied on *Colorado v. Toll*, *supra*. If that case, where the question is summarily treated, was intended to overrule uncited cases like *Gnerich v. Rutter*, *supra*, and *Webster*

suit could not be maintained against a subordinate without the joinder of his superior, this Court said (265 U. S. 391-392) : "The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

¹⁴ Compare *Jump v. Ellis*, 100 F. 2d 130, 135 (C. C. A. 10), certiorari denied, 306 U. S. 645; *Alcohol Warehouse Corp. v. Canfield*, 11 F. 2d 214 (C. C. A. 2); *Moore v. Anderson*, 68 F. 2d 191 (C. C. A. 9); *Moody v. Johnston*, 66 F. 2d 999 (C. C. A. 9); *Carr v. Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Dami v. Canfield*, 5 F. 2d 533 (S. D. N. Y.), with *Rood v. Goodman*, 83 F. 2d 28 (C. C. A. 5); *Ryan v. Amazon Petroleum Corporation*, 71 F. 2d 1 (C. C. A. 5); *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435 (C. C. A. 5); *Berdie v. Kurtz*, 75 F. 2d 898 (C. C. A. 9).

¹⁵ Cf. (1937) 37 Col. L. Rev. 140; Note (1937) 50 Harv. L. Rev. 796; (1940) 26 Va. L. Rev. 370.

v. Fall, *supra*, where the problem was considered at greater length only a few months before, that fact should be made clear.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

APPENDIX

Pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976 (43 U. S. C., Supp. V, sec. 315 *et seq.*):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. * * * Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attend-

ance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas

subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than \$500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the

Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

* * * * *

Sec. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such

districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

* * * * *

Sec. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: *Provided*, That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract.

* * * * *

Sec. 15. The Secretary of the Interior is further authorized, in his discretion, where

vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

* * * * *

Sec. 17. The President shall have power, with the advice and consent of the Senate, to select a Director of Grazing. The Secretary of the Interior may appoint such Assistant Directors and such other employees as shall be necessary to administer this Act. The Civil Service Commission shall give consideration to the practical range experience in public-land States of the persons found eligible for appointment by the Secretary as Assistant Directors or graziers. No Director of Grazing, Assistant Director, or grazier shall be appointed who at the time of appointment or selection has not been for one year a bona fide citizen or resident of the State or of one of the States in which such Director, Assistant Director, or grazier is to serve.

Pertinent provisions of the Grazing Regulations
of March 2, 1936 (R. 23-27):¹⁶

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
DIVISION OF GRAZING
Washington

RULES FOR ADMINISTRATION OF GRAZING
DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local

¹⁶ These regulations have been amended from time to time, but the changes do not affect the legal problems here involved. The current regulations are to be found in 43 Code of Federal Regulations, secs. 501 *et seq.*

usage, but in no event will extend beyond May 1, 1937.

Such licenses will be revocable for violation of the terms thereof and will terminate on the issuance of permits in a district.

An applicant for a grazing license is qualified if he owns livestock and is:

1. A citizen of the United States of America or one who has filed his declaration of intention to become such, or
2. A group, association or corporation authorized to conduct business under the laws of the State in which the grazing district is located.

The following definitions will be used in issuing licenses only:

Property shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is:

- (a) "*Dependent*" if public range is required to maintain its proper use.
- (b) "*Near*" if it is close enough to be used in connection with public range in usual and customary livestock operations. In case the public range is inadequate for all the near properties, then those which are nearest in distance and accessibility to the public range shall be given preference over those not so near.
- (c) "*Commensurate*" for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate.

Priority of use.—Is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper

use of both the public range and the lands or water used in connection therewith.

Issuance of licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order named, will be considered for licenses:

1. Qualified applicants, with dependent commensurate property with priority of use.
2. Qualified applicants with dependent commensurate property but without priority of use.
3. Qualified applicants who have priority of use but not commensurate property.
4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.¹⁷

¹⁷ Cf. 43 Code of Federal Regulations, sec. 501.16.

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior:

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.
2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.
3. Allowing stock to drift and graze on said district lands without a license.
4. Constructing or maintaining any kind of works, structure, fence, or inclosure without authority of law or license.
5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licenses will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.
2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per

day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than \$500."

* * * * *

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.

HAROLD L. ICKES,
Secretary of the Interior.

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